Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
	)	

Reply Comments of A&E Television Networks

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Summary

AETN advocated the "no must carry option" in its opening Comments because any form of redundant must carry right for broadcasters reaffirms and extends the second class status of cable programmers. Must carry advocates have failed to justify imposing new, duplicative carriage requirements as a matter of statutory interpretation, constitutional analysis or as a question of sound public policy.

None of the comments filed in this proceeding justifies adoption of an industrial policy to sell TV sets. If digital television produces the benefits attributed to it, neither cable operators nor any other sector of the television industry will be able to forestall the transition. Those providers who give the consumer the better product will flourish, while those who resist doing so will not. But there is absolutely no basis for adopting DTV must carry rules unless the FCC can confidently answer the question, "What will motivate consumers to purchase digital televisions?" To adopt rules in the face of any uncertainty regarding the technology or its marketplace appeal is to invite disaster.

Broadcasters' and manufacturers' selective advocacy of regulatory alternatives demonstrates the necessity of relying on market-based solutions to accomplish the digital transition. Broadcasters describe the transmission of HDTV programming as "a centerpiece application of the digital broadcasting standard," yet have opposed the adoption of any HDTV requirements. A similar paradox affects the arguments regarding technical standards for DTV. Although NAB notes that certain technical problems may prevent or make difficult the reception of DTV signals, pro-must

carry advocates oppose the adoption of technical requirements. Additionally, various commenters point out that DTV will succeed only if there is a sufficient amount of programming available. However, much, if not most, of the initial programming is going to be simulcast, and there is no requirement that broadcasters provide HDTV programming. There is no legal or policy rationale to support broadcasters' and manufacturers' demands that the Commission regulate the cable industry, but to oppose regulation of their own industries.

Finally, none of the intended beneficiaries of analog must carry would be helped by digital must carry. At best, must carry proponents advocate something of a digital "trickle down" effect for DTV, and at worst they ignore the interests of less affluent viewers altogether. Similarly, small broadcast stations would be more likely to harmed by digital must carry, because of the 1/3 capacity limit on the number of channels that can be required. Ultimately, digital must carry would undermine the public interest because it would result in the widespread loss of multiple existing networks on cable systems throughout the nation's major markets.

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To the Commission:

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A&E Television Networks (including the A&E Network and The History Channel) ("AETN"), pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submit reply comments in the above-captioned proceeding (the "*Notice*" or "NPRM"). 1/

Although the Commission presented commenters with a range of options for digital must carry, most opening comments supported options at the opposite ends of the spectrum -- either immediate must carry or no must carry. While it is tempting to seek the expedient of some middle ground between the conflicting positions presented in the comments, any must carry rule that would emerge necessarily would give broadcast stations a preference over cable networks, not just once, but twice. Accordingly, AETN advocated the "no must carry option" because any form of

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1/ *Carriage of the Transmissions of Digital Television Broadcast Stations*, FCC 98-153, CS Docket No. 98-120 (rel. July 10, 1998).

redundant must carry right for broadcasters reaffirms and extends the second class status of cable operators.

AETN presented arguments that the burden of justifying new, duplicative must carry rules has not been met as a matter of statutory interpretation, constitutional analysis or as a question of sound public policy. While the opposing comments differ in predictable ways in the analysis of these questions, there is no question about the fact that the controlling precedents place the burden of justifying any new must carry rule squarely upon the government. *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1186 (1997) ("*Turner II*"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"). AETN will not attempt to recapitulate the various statutory and constitutional arguments raised in the opening comments. Instead, this reply will focus on three issues:

- Nothing in the opening comments justifies adoption of an industrial policy to sell TV sets;
- Broadcasters' and manufacturers' selective advocacy of regulatory alternatives demonstrates the necessity of relying on market-based solutions to accomplish the digital transition;
- The "public interest" notions of DTV must carry proponents will not advance the public interest concepts embodied in the Cable Act.

I. MUST CARRY PROPONENTS CANNOT JUSTIFY ADOPTING AN INDUSTRIAL POLICY TO SELL TELEVISION SETS

Echoing Charles E. Wilson's infamous statement of corporate arrogance that "what is good for GM is good for the country," 2/ proponents of DTV must carry rest much of their argument on the notion that what is good for Circuit City is good for the nation. The National Association of Broadcasters ("NAB") states plainly that the "touchstone for regulatory policy" in this proceeding boils down to determining "what policies will best encourage the sale of DTV sets." NAB Comments at 10. Not just once, but more than a dozen times, NAB makes the point that the substantial governmental interest in this proceeding is to sell new TVs. 3/ Other commenters make the same point. 4/

2/ Wilson, who had been President of General Motors, made the statement during his confirmation hearing to become Secretary of Defense in 1952. *See* Richard A. Wright, WEST OF LARAMIE: A BRIEF HISTORY OF THE AUTO INDUSTRY (http://www.comm.wayne.edu/staff/wright/autohistory/13.html).

3/ *See* NAB Comments at ii (must carry is needed "to entice consumers to buy DTV sets in large numbers"), iv (requiring carriage of the entire DTV signal will act "as an enticement for consumers to purchase DTV receivers"), 7 (must carry will provide "an incentive for consumers to purchase DTV sets"), 8 (without must carry "DTV receiver sales will not be as robust as needed"), 10 ("For the transition to succeed, consumers must buy DTV sets."), 11 (DTV policy is centered around "the Christmas selling season"), 14 ("Success of the transition requires consumers to have every incentive to buy DTV sets . . ."); 14 (FCC policy should "entice [consumers] to buy sets"), 16 ("Selling DTV Sets is the Key to Swift Transition"), *id.* (selling DTV sets is the "touchstone for regulatory policy"), 17 (FCC should "tempt [consumers] to taste the transition and purchase DTV receivers"), 22 (without must carry "cable consumers will not be tempted to buy DTV sets"), 23 (must carry is necessary "to encourage set sales").

4/ Comments of Granite Broadcasting at 6; Comments of Philips Electronics at 8; Comments of Thompson Consumer Electronics at 5, Comments of Corporation for General Trade at 3.

In contrast, AETN believes that what is good for the consumer is good for the nation, and this means letting the market determine the rate and nature of the digital transition, rather than trying to force the conversion through industrial policy. Quite simply, if digital television produces the benefits attributed to it, neither cable operators nor any other sector of the television industry will be able to forestall the transition. Those providers who give the consumer the better product will flourish, while those who resist doing so will not. Must carry proponents do not disagree with this fact of life; they simply assume that the laws of economics do not apply to the cable industry. But as the Consumer Electronics Industry Association ("CEMA") noted with respect to its own constituents, "it would be economically foolish for any consumer electronics manufacturer to introduce into the marketplace a digital television receiver that does not meet and exceed customer expectations." CEMA Comments at 25. The same is true for cable operators -- it would be economically untenable for cable operators not to meet consumer demand for digital television. 5/

At the same time, proponents of the rules urge the Commission to ignore consumer demand and to force the cable industry to adopt duplicative must carry obligations, assuming that such an action will "entice [consumers] to buy sets." NAB Comments at 14. Circuit City, for example, argues that "to the extent that cable operators are investing in upgrades to expand their channel capacity in order to carry their own programming, they should similarly be *required to invest in upgrades*

5/ *See, e.g.*, Comments of Circuit City at 6 ("Circuit City is confident that cable operators, who face incremental competition from satellite operators and, where feasible, from broadcasters themselves, will support the transition to digital signal delivery rather than rely on converting DTV signals to analog prior to transmission.").

necessary to carry digital television signals." Circuit City Comments at 14 (emphasis added). Must carry advocates take these positions despite the fact that all commenters to this proceeding acknowledge that many factors will be necessary to "entice" consumers to buy digital televisions, ranging from technical obstacles that must be overcome, to the nature of the programming and other services that may (or may not) be provided, to the price. As NAB pointed out, "[f]or the transition to succeed, consumers must buy DTV sets. Without that, there will be no DTV transition." NAB Comments at 10.

But there is absolutely no basis for adopting DTV must carry rules unless the FCC can confidently answer the question, "What will motivate consumers to purchase digital televisions?" To adopt rules in the face of any uncertainty regarding the technology or its marketplace appeal is to invite disaster. The history of technology is littered with the carcasses of ideas that were seen as a sure thing by the top experts of their time, yet failed to catch on due to technical flaws or a lack of consumer acceptance.

For example, Thomas Edison, one of the greatest inventors of all time, was convinced he could revolutionize the automobile industry in the early 1900s through improvements in dry cell batteries. In 1903, Edison announced that he had made the critical breakthrough in the technology, and Studebaker Brothers Manufacturing Company began to produce a line of electric cars on the strength of this claim. The battery, however, failed to live up to expectations, and it proved to be one of

the biggest flops in Edison's long career. 6/ A similar fate befell another legendary inventor, Charles Kettering, who also sought to revolutionize the auto industry with the invention of the copper-cooled engine. Kettering, who had invented the first electrical ignition, and who led teams that developed improved motor fuels, shock absorbers, safety glass and the variable speed transmission, was convinced he could solve the technical problems. On the strength of his reputation, GM produced and marketed thousands of the cars in the early 1920s. But the copper-cooled engine never worked as expected, and GM was forced to buy them back from individual owners. Many of these cars were simply dumped into Lake Erie. 7/ Another car of the future -- the Ford Edsel -- which was introduced in 1958, went down as "the greatest automotive marketing disaster of all time." 8/

Whether in the automotive or consumer electronics field, the lesson is the same: technological success and consumer acceptance are extremely hard to predict, even by experts. 9/ And as bad as these above examples of failure may be, they would

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6/ *See The Edison Battery*, RIDE & DRIVE (Thomas E. Bonsall, ed.) (http://www.rideanddrive.com/edison.html).

7/ *See The Saga of the Copper-Cooled Chevy*, RIDE & DRIVE (Thomas E. Bonsall, ed.) (http://www.rideanddrive.com/copper-cooled.html); Richard A. Wright, WEST OF LARAMIE: A BRIEF HISTORY OF THE AUTO INDUSTRY (http://www.comm.wayne.edu/staff/wright/autohistory/05.html).

8/ *See Megaflop: The Edsel Debacle*, RIDE & DRIVE (Thomas E. Bonsall, ed., Aug. 1998) (http://www.rideanddrive.com/edsel.html)

9/ As Chairman Kennard has emphasized, "Nobody -- nobody -- can predict, with any degree of certainty, how [the digital transition] is all going to work out. And it is not the sort of transition that lends itself to central industrial planning." *See* Don West, *The Medium They Couldn't Kill*, BROADCASTING & CABLE, Nov. 16, 1998 at S7.

have been infinitely worse if the technologies had been mandated across the board as government policy. A bad choice would not be limited to the company that incorrectly predicted the future, but would devastate the entire industry. Yet that is precisely what must carry advocates are proposing for the television industry in this proceeding. In the face of unanswerable technical and marketing uncertainties, they propose requiring all segments of the industry to conform to a governmental selection for digital carriage. As Commissioner Powell has foreseen, given the difficulties of predicting consumer acceptance, "we're facing a potential train wreck" in the transition to digital television. *See* Bill McConnell, *Powell Raises Red Flag Over DTV Switch*, BROADCASTING & CABLE, Sept. 14, 1998 at 14.

In other respects, the Commission has recognized that it cannot impose its guesses about the future of technology on the television market. Color television, for example, first introduced in 1954, 10/ did not have significant penetration among television households until the seventies. 11/ Like DTV, the first color television sets were very expensive. *See* Remarks of William E. Kennard, Chairman, Federal Communications Commission, at the International Radio and Television Society, New York City, Sept. 15, 1998. But the FCC let the market for color television develop naturally, without imposing mandates. It is impossible to predict what would have

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10/ The FCC adopted technical standards for color television in December 1953. *See Rules Governing Color Television Transmission*, Report and Order, Docket No. 10637 (adopted Dec. 17, 1953). See also West, supra note 9 at S7 ("Color TV took 22 years to reach 85%. VCRs took 16 years. CDs, after 13 years, are only at 68%.").

11/ By 1971 only about half the homes in the Unites States had color television sets. *See* 27 TELEVISION DIGEST, No. 52 (1971).

happened if the FCC had attempted to impose a timetable on color TV development and had forced industry to adhere to it. It is doubtful that the government could have hastened the movement toward color television by imposing rules.

Similarly, the FCC has been circumspect with respect to imposing DTV mandates. Recognizing the many uncertainties inherent in the conversion to digital television, the Commission has refrained from requiring broadcasters to provide high definition DTV service and permitted licensees the option to provide multicasting, software distribution, interactive services, non-broadcast data transmission and other services to the public. This level of flexibility was provided out of recognition of the extreme uncertainties facing the development of digital television. The same considerations apply to this proceeding. *See id.*, Remarks of William E. Kennard ("nobody has the answer to the who, what, where, when, and how of digital TV"); Remarks of Commissioner Powell, FCC Open Meeting, July 9, 1998 (must carry proceeding is confounded by "an astonishing number of unknowables" that "only the consumers can answer"). The FCC should be extremely skeptical when it is asked to make policy decisions based on predictions about which technologies will develop, what hurdles will be overcome, what will happen with prices, and what consumers will want.

II. BROADCASTERS' BOTTOM LINE: REGULATION FOR THEE BUT NOT FOR ME.

The Commission should be all the more skeptical in this proceeding where must carry proponents simply assert without any support whatsoever that cable

television will act as a "bottleneck" to the receipt of DTV signals. 12/ Even if this allegation were true, there are many "bottlenecks" through which the digital transition must pass. As Chairman Kennard has pointed out, "[t]he roll-out of DTV . . . involves many industries," each of which are essential to the success of the technology. 13/ Many factors are identified as being necessary for the success of digital television, yet broadcasters and equipment manufacturers uniformly urge the Commission to impose must carry rules on the cable industry but not to adopt rules that would affect their operations. Only when competition takes place in the halls of regulatory agencies rather than in the marketplace is such hypocrisy possible.

A. Must Carry Will Not Affect Other "Bottlenecks" to the Success of Digital Television

Given the significance of the many factors that will determine the success or failure of digital television, it is very difficult to say that must carry rules would serve the government's interest in a "direct and material way." Or, put another way, it is almost impossible to demonstrate that must carry is necessary (or would be more helpful) than other possible regulations that are opposed by must carry advocates.

HDTV Requirements. Broadcasters describe the transmission of HDTV programming as "a centerpiece application of the digital broadcasting standard." NAB Comments at 37. As Circuit City stated:

12/ Contrary to these claims, equipment manufacturers make clear that DTV signals can be received off the air. *See* discussion *infra* at p. 17.

> The transition to DTV would hardly be worth the investment if *all* that occurred were for cable operators to change the technical means by which broadcast signals are acquired. The subscriber would see little or no difference in presentation or picture quality. In Circuit City's view, the massive national investment in DTV will be worthwhile only if consumers have the opportunity to experience the potential improvements in detail and resolution that DTV in general, and HDTV in particular, offer. This means presentation of signals in full HDTV resolution.

Circuit City Comments at 6 (emphasis in original). Other commenters support this view that high definition programming is essential to the success of the DTV transition. *See* CEMA Comments at 12 ("substantial surveys indicat[e] that the enhanced viewing experience is one of the major attractions for consumers to further the goals of the transition by purchasing digital television receivers"); Comments of Sony Electronics, Inc. at 8 ("Sony believes that HDTV will be a significant driving force in the ultimate acceptance of DTV"). See also West, supra note 9 at S5 ("Bill Mannion, Panasonic's General Manager for TV and network systems emphasizes . . . that HDTV will be the backbone of its marketing efforts, not SDTV").

Despite the importance of HDTV programming to the transition, there is no requirement that any broadcaster transmit any programming in the high definition format because broadcasters strenuously argued in earlier proceedings that flexibility is vital to DTV's success. 14/ Yet here, broadcasters claim -- without any support -- that

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13/ Remarks of William E. Kennard, Chairman, Federal Communications Commission, at the International Radio and Television Society, New York City, Sept. 15, 1998.

14/ The broadcast industry vehemently opposed any requirement that licensees transmit high definition programming, arguing instead for maximum flexibility. *See, e.g.*,

must carry requirements will be critical to "enticing" consumers to purchase DTV sets. But if cable operators are required to carry both digital and analog signals, while broadcasters are under no compulsion to transmit in high definition, there is little reason to believe that consumers will be "tempt[ed] . . . to taste the transition and purchase DTV receivers." NAB Comments at 17. Conversely, if flexibility is necessary with respect to HDTV mandates because of marketplace and technical uncertainties (as the broadcast industry previously argued), then it is equally necessary with respect to carriage requirements. The broadcasters simply cannot have it both ways.

Technical Standards. A similar paradox affects the arguments regarding technical standards for DTV. NAB notes that certain technical problems may prevent or make difficult the reception of DTV signals. NAB Comments at 46. Indeed, most broadcasters who support DTV must carry rules argue that any factor that "degrades"

Comments of the National Association of Broadcasters, MM Docket No. 87-268 (filed Nov. 20, 1995) at 1 ("NAB is not supportive of government-mandated minimums of HDTV-quality program of any other particular format, quality or content for the ATV channel. The driving force behind the transition to ATV is the need to deliver television programming that viewers want and will watch and that is competitive with other media offerings."); 2 ("By providing maximum latitude, the Commission will encourage development of diverse new programming services that will facilitate the most rapid acceptance of ATV and lead to the most rapid return of the NTSC spectrum."); *id.* ("Neither the quality level nor the content of the ATV signal should be regulated. History is full of examples where the vitality of the marketplace results in unexpected demand for unpredicted services."); 3 ("[f]ixed rules about minimum quantity of HDTV are simply unwarranted"); 5 ("NAB believes that the most rapid ATV transition will take place with broadcasters having maximum flexibility to explore the new medium and to find, through unrestricted experimentation, which service offerings will be enticing enough to sell and satisfy the viewing audience.").

the digital signal will harm the DTV transition and should be regulated. 15/ However, these concerns are hardly unique to the cable portion of the distribution chain. By this logic, any equipment that is part of the digital transition should be regulated to ensure that consumers receive the highest quality DTV signal.

But that logic is not reflected in the comments. Equipment manufacturers and retailers oppose any minimum performance requirements or other mandatory standards for digital television receivers. *See, e.g.*, Comments of Sony Electronics, Inc. at 6 ("It is not necessary or advantageous for the Commission to promulgate DTV receiver standards. Such standards would unnecessarily stifle innovation and creativity in the design of DTV receivers and other connection devices."); Comments of Thomson Consumer Electronics, Inc. at 24 ("government-mandated standards are both unnecessary and not in the best interests of consumers"). In particular, CEMA argues that the marketplace will force manufacturers to produce high-performance products, and that "receiver standards that would require regulatory action to amend in order to incorporate better designs would delay technological improvements to receivers that otherwise could be quickly incorporated." CEMA Comments at 25-26.

Programming Availability. Various commenters point out that DTV will succeed only if there is a sufficient amount of programming available. 16/ However, much, if not most, of the initial programming is going to be simulcast, and, as noted

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15/ These comments, predictably, focus on actions by cable operators that they assert will "degrade" the digital signal, but there is no logical reason to limit this concern to cable. *See* NAB Comments at 40; ALTV Comments at 62; APTS Comments at 44.

16/ *E.g.*, Granite Broadcasting Comments at 12; Philips Electronics Comments at 9.

above, there is no requirement that broadcasters provide HDTV programming. In addition, questions regarding copy protection for digitally transmitted content will be critical to the development of DTV and related technologies. *See, e.g.*, Comments of Zenith Electronics Corp. at 10. Without adequate copy protection, content producers will be reluctant to produce new original programming for DTV. Sony Electronic Comments at 8; Hitachi, Ltd. Comments at 1.

Broadcasters have consistently opposed any kind of content requirements, and equipment manufacturers oppose any regulation governing copy protection, yet it is not certain how the digital transition will be accomplished without unique programming for DTV. People do not buy expensive hardware based on the promise that compelling shows will be produced at some indefinite future time. They buy sets when they believe they are missing something that they could not otherwise get. As NAB has represented to the Commission, VCR penetration exceeded one percent (even though the devices had been on the market for years) only after low-cost rentals of pre-recorded tapes became a phenomenon. Comments of the National Association of Broadcasters, MM Docket No. 87-268 (filed Nov. 20, 1995) at 2. People would not spend a few hundred dollars to purchase a VCR until low-cost programming was widely available, and it still took over two decades to reach 85% penetration. Id. Yet in this proceeding, broadcasters suggest that 85% of the population will spend several thousand dollars for televisions over the next 8 years in the absence of any programming mandates or guarantees. In this circumstance, it nonsense to assert that digital must carry is the one factor that will determine the pace of the DTV transition.

Investment in the DTV Transition. Must carry proponents acknowledge that significant investments will be necessary to make digital broadcasting a success, but ask the Commission to place a disproportionate share of that burden on the cable industry. For example, Circuit City acknowledges that digital television equipment will reach significant penetration only after economies of scale drive down the price. However, it advocates placing the burden of reaching such economies on the cable industry:

> [T]o the extent that cable operators are investing in upgrades to expand their channel capacity in order to carry their own programming, they should similarly be required to invest in upgrades necessary to carry digital television signals.

Circuit City Comments at 14. Various broadcast industry commenters agree that the cable industry should be compelled to make the investments necessary to carry DTV signals, 17/ and some go so far as to suggest that cable operators should be precluded from raising rates even if their costs rise as a result of DTV rules. Comments of Pappas Broadcasting at 37.

While it may be understandable why the broadcast industry succumbed to the temptation to propose government mandates that would force other businesses to invest in their digital future, it is hardly fair. It is particularly inequitable in light of the gift of an additional 6 MHz of spectrum given to every broadcast station in America. No other industry has been the recipient of such governmental largess. Similarly, although

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17/ Pappas Broadcasting Comments at 37; Trinity Broadcasting Comments at 4; Corporation for General Trade Comments at 4; ALTV Comments at 48; Golden Orange Comments at 3.

the consumer electronics industry has not been granted free spectrum, it is the beneficiary of a government policy designed to replace almost every television in America with a more expensive model on an expedited schedule. These policies have quite correctly been described as a "windfall" for their recipients, yet the beneficiaries still advocate imposing regulations on the cable industry, which receives only burdens and no benefits from this scheme.

This position is utterly perverse in a free market economy -- particularly in a digital economy. Circuit City and NAB no doubt are correct when they assert that more people will buy digital televisions once the price drops out of the stratosphere. But why is lowering the cost of Circuit City's inventory the responsibility of any other business, much less an appropriate subject of regulatory action? The consumer electronics industry and their retailers can achieve this goal simply by lowering the price of digital equipment at the outset. This has been the historic practice in the consumer electronics industry. *See, e.g.*, Kevin Kelley, NEW RULES FOR THE NEW ECONOMY 53 (1998) (describing how in the early 1960s Fairchild Semiconductor created a market for UHF tuner transistors by slashing the price by 99%). And it is the predominant mode of entrepreneurial investment in the digital economy. *Id.* at 57 ("Ubiquity drives increasing returns in the network economy."). 18/ To the extent broadcasters and the consumer

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18/ Kelly, *supra* at 58 ("It cost Netscape $30 million to ship the first copy of Navigator out the door, but it cost them only $1 to ship the second one. Yet because each copy of Navigator sold increases the value of all the previous copies, and because the more value the copies accrue, the more desirable they become, it makes a weird kind of economic sense to give them away at first. Once the product's worth and indispensability is established, the company sells auxiliary services or upgrades, continuing its generosity in a virtuous circle.").

electronics industry plan to reap the rewards of the digital transition, they have an obligation to take the necessary risks, and not to lay them off onto others through political action.

B. By Seeking to Circumvent the Free Market, Must Carry Advocates Fail to Anticipate the Unintended Consequences of Regulation

The contradictory nature of the comments favoring must carry underscores the wisdom of letting the market work, and allowing viewers' preferences to prevail. Proponents of must carry treat viewers as if they are a blank slate, upon which policymakers may impose their preferences. Such policy demands typically have significant unintended consequences, and are counterproductive.

1. Proponents of Must Carry Would Create Their Own "Bottleneck"

Must carry would perpetuate cable's status as a supposed "bottleneck." NAB argues that "precluding cable's expected exercise of its gatekeeper power with regard to DTV signals is as necessary to preserve free television service as it was with regard to NTSC," NAB Comments at 7, yet it proposes regulations that would reinforce cable television as the primary mode of delivery of DTV signals. As Circuit City pointed out, customers who receive digital signals via cable or other MVPD "will have no need for the existing analog spectrum." Circuit City Comments at 5. Whereas the digital transition offers the broadcast industry the opportunity to end its supposed dependence of cable television forever, must carry proponents seek to preserve the status quo.

Must carry proponents' comments ignore the obvious fact that economic incentives will compel industry to provide DTV sets that can receive off-air signals. The

equipment manufacturers acknowledge this point, if backhandedly, when they defend the integrity of their products. For example, the electronics manufacturers dispute claims that DTV receivers will not be able to receive off-air signals within FCC-designated service areas. Accordingly, "CEMA has developed a comprehensive antenna mapping guide that will be furnished to over 30,000 retailers across the United States. The mapping guide divides every television viewing market into five color-coded regions, and will ensure, to the greatest extent possible, that every consumer is outfitted with an antenna appropriate to their location." CEMA Comments at 26. *See* Comments of Thomson Consumer Electronics, Inc. at 23 n.32 ("Thomson, through its retail representatives, will work with consumers to ensure that he or she is equipped with an antenna that maximizes reception according to the customer's location.").

It is reasonable to believe that consumers who spend $5-7,000 on a new television will make certain that they can switch from cable programming to off-air reception, just as subscribers to DBS service do, by using their remote controls. *Id.* at 24 (A/B switches "will be a standard feature in all of Thomson's DTV receivers, usually located on the receiver's remote control unit, based on our assessment that such a feature will respond to consumer demands for an easy-to-operate method of accessing DTV signals directly off-air."). *See* CEMA Comments at 26 ("CEMA is confident that DTV receivers will be capable of receiving and displaying off-the-air signals with excellent picture quality."). If the equipment manufacturers are to be believed, there is absolutely no justification for DTV must carry.

2. Must Carry Advocates Ignore the Economic Consequences of Their Proposals

Proponents assume that they can make DTV sets more popular by forcing cable operators to "piggyback" digital service with duplicative (or blank) channels. This argument rests on the dubious assumption that federal regulations can change the nature of the cable television product without any effect on the demand for cable services. During the transition period, the vast majority of cable subscribers would see nothing but a blank screen on channels designated for digital signals. Those few subscribers who could afford digital sets would receive largely duplicative programming.

Such clutter on the basic tier would not be a great selling point for cable television, particularly in a world of increasing competition. What is most likely to occur if must carry advocates get their way is that the rules will create disincentives for viewers to subscribe to cable television, because it will make the service far less attractive. The Commission has had some experience with this phenomenon in its regulation of cable television rates. One study found statistically significant declines in basic cable subscribership during the period of rate regulation as lower prices induced cable operators to adjust the quality of their product downward. 19/ The same effect would be inevitable if the Commission mandates duplicative must carry obligations.

19/ *See* Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. OF REGULATORY ECON. 173 (1997).

III. THE PUBLIC INTEREST CALCULUS IS COMPLETELY REVERSED FOR DIGITAL MUST CARRY.

A. Who Will Benefit From DTV Must Carry?

Not Viewers. At best, must carry proponents advocate something of a digital "trickle down" effect for DTV, and at worst they ignore the interests of less affluent viewers altogether. The purpose of analog must carry was to benefit the least affluent viewers (who presumably could not afford cable), while digital must carry does nothing for them. The intended beneficiaries of analog must carry were non-cable households, who purportedly would receive fewer (or poorer quality television signals) if stations were dropped by cable operators. Here, however, non-cable households will receive no benefit at all from DTV must carry rules, since they will automatically receive all DTV signals over the air. *See* CEMA Comments at 26 ("DTV receivers will be capable of receiving and displaying off-the-air signals with excellent picture quality.").

Digital must carry is no bargain for cable subscribers, either. Under the best case scenario, cable households equipped with digital televisions or converters will receive duplicate channels with largely simulcast programming. Subscribers who lack such equipment -- the vast majority for quite some time -- will receive a blank screen. A far more likely scenario is that these duplicate (or blank) channels will supplant existing cable networks that provide diversity and that subscribers currently enjoy.

Moreover, broadcasters have yet to provide a persuasive demonstration as to why they are so special as to warrant a legal preference over other programmers and how such favoritism will benefit consumers. For example, a Joint Report of Media Access Project and the Benton Foundation analyzed five broadcast markets of various

sizes and found that over the air broadcasters "are providing almost no programming that addresses local issues in the communities they serve." 20/ Specifically, in the five markets combined, the MAP/Benton study found that .35% of broadcast time was devoted to local public affairs, and 35 percent of the stations provided no local news at all. By sharp contrast, cable programming networks are increasingly covering issues of public importance and news events that broadcasters are unable -- or unwilling -- to cover. *See* Adam Clayton Powell, III, *Cable News Gets Historic Impeachment Exclusive by Default*, FREE! December 15, 1998 (http://www.freedomforum.org/professional/1998/12/15clinton.asp) ("As major broadcast television networks virtually ignore live House impeachment hearings, cable news executives warn that broadcasters have forced news viewers to abandon broadcast TV and turn to cable."). There is no automatic public interest benefit from favoring broadcasters.

Not Small Broadcasters. Analog must carry was designed to assist small or marginal television stations that could not take advantage of retransmission consent. Digital must carry, by sharp contrast, will not help such broadcasters, and is more likely to hurt them. This is true not just because the digital roll-out occurs first among the large market major network affiliates, 21/ but because of the way must carry

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20/ *See* Joint Report of the Media Access Project and Benton Foundation, *What's Local About Local Broadcasting?* (http://www.benton.org/Policy/TV/whatslocal.html). The five markets studied were Chicago, Phoenix, Nashville, Spokane and Bangor.

21/ The legal analysis appended to the NAB Comments acknowledged that "the stations that will move to digital most quickly are the stations that are network affiliates in the largest markets, *i.e.*, the ones most able to ensure carriage through retransmission consent and the least likely to rely upon must carry." Jenner & Block Analysis at 18-19, Attachment A to NAB Comments.

rules work. Because must carry rules do not guarantee carriage for all broadcast signals, small stations are likely to be left out.

Large broadcasters acknowledge that any must carry obligation is limited by the 1/3 channel capacity cap. The effect of this restriction, according to a legal analysis attached to NAB's comments, is that "for those cable systems that are already at their caps, the additional requirements imposed by the mandatory carriage of both analog and digital signals will cause no increased burden whatsoever." Jenner & Block Analysis at 18, Attachment A to NAB Comments. Instead, "those cable operators simply have more broadcast signals from which to choose as they fulfill their must-carry obligations." *Id.* In other words, those cable operators will have the discretion to carry only the largest broadcasters (who, incidentally, will begin transmitting DTV signals first).

The effect of this phenomenon can be understood only be examining the number of broadcast channels eligible for carriage in each cable system and comparing it to the statutory limit. AETN performed such an analysis for the top ten markets, and found that carriage obligations will be limited in thousands of instances because of the 1/3 channel capacity cap. 22/ This analysis reveals that in the top 10 markets alone, the statutory cap would result in approximately 4,636 nominally eligible signals not receiving carriage on in-market cable systems, even if the Commission mandated that

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22/ *See* Appendix III to AETN Comments. The Commission should note one typographical error in Appendix III. In the New York market, Port Chester Cablevision would be unable to carry only 14 broadcast signals, not 140 as incorrectly listed. This change reduces the total number of signals ineligible for compulsory carriage under the statutory cap in New York to 362, and the total number of signals ineligible for compulsory carriage in all top ten markets to 4,636.

every local broadcast station's analog and digital signals were eligible for must carry or retransmission consent privileges. *See* AETN Comments at Appendix III.

The economic analysis appended to the Comments of NAB supports AETN's analysis. Even in the top 10 markets, the NAB analysis asserts that the "average" cable system has no more than 66 full channels. 23/ Pursuant to the statutory cap, a system with 66 channels can be compelled to transmit 22 eligible broadcast signals. In other words, even in the nation's largest markets, no more than 11 broadcast stations eligible for mandatory carriage can compel carriage of their digital and analog signals on the average cable system -- and those 11 would compel digital carriage at the expense of any other station in the market receiving *any* compulsory carriage or retransmission consent privileges *for either its analog or digital signal.* Assuredly, this is not the result intended by the Cable Act. 24/

Realizing the real world implications of this, smaller broadcasters are urging the Commission to ignore the plain limitations imposed by the Cable Act. A

23/ *See* Analysis of Strategic Policy Research, Addendum D to NAB Comments at 14 ("SPR Analysis"). Again, this aspect of the economic analysis appeared to use the same "weighted average" calculus described above.

24/ The NAB's "weighted average" examination of channel capacity in other major markets does not improve the outlook for digital must-carry. In the 11th to 25th ranked markets, only 54 full channels exist on the average system, which would limit carriage to no more than 9 digital and analog stations. Such capacity is insufficient to serve the number of broadcast stations in these markets. For instance, Denver, which is only the 18th ranked market, nonetheless has 14 commercial, non-satellite television stations, *see Broadcasting & Cable Yearbook 1998* at B-168. It is obviously significant that, according to NAB's "weighted average" analysis, which NAB describes as "an important measure to consider," *see* SPR Analysis at 13, digital compulsory carriage in most major markets would not result in any benefit to many -- if not most -- of the commercial broadcast stations in these markets.

number of commenters assert that the FCC can and should ignore the 1/3 channel capacity limit on must carry. *See* Comments of Golden Orange Broadcast Co. at 3; Comments of Maranatha Broadcasting Co. at 9; Comments of Granite Broadcasting Corp. at 2; Comments of Sinclair Broadcasting Group at 6; Comments of UPN Affiliates at 4; Comments of Pappas Broadcasting at 28. Of course, the Commission has no authority to waive a statutory limit, as NAB admits. *See* Jenner & Block Analysis at 19 ("despite the fact that (in theory) twice as many stations are eligible for mandatory carriage, the statutory caps remain constant"). But the comments demonstrate vividly why digital must carry will not serve, but would seriously undermine, a central purpose of analog carriage requirements -- assisting the small broadcaster.

This also demonstrates why broadcasters cannot identify a coherent public interest justification for digital must carry rules. NAB asserts that such carriage requirements are needed to guarantee equitable distribution of local broadcasting service in accordance with Section 307(b) of the Communications Act. *See* Jenner & Block Analysis at 11. Yet must carry advocates measure the impact of must carry rules by reference to aggregate estimates of channel capacity. This approach undermines traditional must carry goals, as well as the policies underlying Section 307(b). 25/ The real impact of digital must carry will be a patchwork effect that has totally different results system by system. This is demonstrated by the analysis of cable systems in the top 10 markets contained in Appendices II and III to the AETN Comments.

25/ See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-77 (1968); Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 17, 27, 37 (1984).

B. Digital Must Carry Requirements Would Undermine the Public Interest in Programming Diversity

Under the best case scenario, digital must carry will reduce programming diversity by requiring cable subscribers to receive duplicative programming and blank screens in many cases. But the "best case" is not the most likely case. As AETN demonstrated in the Appendices to its Comments, most cable systems in the top ten markets do not have the capacity to carry digital television signals without depriving their subscribers of a significant number of cable channels and a substantial amount of programming diversity. 26/ In these markets, mandatory carriage of digital signals would result in the approximate loss to cable subscribers of 5,777 established cable channels. 27/

NAB attempts to show the contrary: that mandatory digital carriage would have no disruptive effect on what networks a cable system is able to carry. Yet, NAB's own numbers demonstrate the upheaval that digital must-carry would wreak in the most populous markets in the nation. NAB's economic analysis shows that cable systems in

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26/ *See* AETN Comments at Appendix II. As noted in the Comments, the nature of the analysis caused it to be subject to several caveats, which generally assumed that each system listed would be required to carry the digital signal of every broadcast station licensed to the Nielsen DMA. It also should be noted that minor typographic or other errors affected a few of the individual entries in the studies. Notably, in Appendix II, a Canadian station apparently was included in the count of stations licensed to the Detroit market. As a result, 87, not 100, cable channels would be displaced in the Detroit area (and 5,777 overall in the top 10 markets).

27/ This number does not take into account the 1/3 channel capacity cap. With the cap, the loss would be approximately 1,000 lost channels in the top 10 markets. At the same time, the 1/3 cap means that broadcasters would not have must carry rights in approximately 4,636 instances. *See* Appendix III; *see also* note 22, *infra*. Either way, must carry rules would disserve the public interest.

the top ten markets currently have only four vacant channels per system, based on a weighted average of systems in each market. 28/ The 11th to 25th television markets confront an even bleaker picture -- fewer than three vacant channels per system subscriber. *See* SPR Analysis at 14. In other words, according to NAB, the cable systems in the top 25 markets, on average, can add no more than four new digital broadcast signals without suffering outright loss of existing services. But each of these top 25 markets have far more than four broadcast stations. (As a point of reference, the top eight markets all have more than *15* broadcast stations.) Accordingly, the NAB's analysis confirms what AETN's more detailed study shows: that digital must-carry would result in the widespread loss of multiple existing networks on cable systems throughout the nation's major markets.

Beyond these numbers -- which support AETN's analysis of the top 10 markets -- the rest of the SPR Analysis prepared for NAB is difficult to assess, especially in light of its clear bias toward NAB's preferred outcome. 29/ Unlike AETN's

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28/ See SPR Analysis. This weighted average appears to have multiplied the number of channels on each system by the number of subscribers on each system in a relevant market or grouping, added the resulting products together, and then divided the total by the total number of subscribers in that system or grouping. Because the NAB analysis did not describe, in any type of detail, its methodology, it is impossible to consider whether the study suffers from any type of procedural, mathematical or other assumptions or errors. Assuming the analysis is accurate, however, it only confirms what AETN's intentionally transparent "snapshot" analysis demonstrates: that vacant channels in the top markets are sparse, and clearly insufficient to carry a digital signal, as well as a broadcast signal, from each television station assigned to these markets.

29/ *See, e.g.*, SPR Analysis at Executive Summary ("[W]e determine that a number between *200 and 500* mixed digital and analog channels is *readily* within the reach of most operators *within the next few years*") (emphasis added). The bias is also apparent in the Analysis switch from weighted averages to unweighted averages at times beneficial to NAB's positions: for example, despite the "importance" of weighted

intentionally replicable and clearly documented studies, the SPR Analysis neither reveals the assumptions it relies upon nor demonstrates the analysis it used to evaluate channel capacity in systems across the nation. In fact, for the most part, the NAB analysis focuses not on today's numbers -- which, as noted above, only underscore the disruption that digital must-carry would cause to cable subscribers throughout the country without providing any real benefit to many broadcast stations -- but on its projections of future cable capacity and the various possibilities of digital technologies. *See, e.g.*, SPR Analysis at 21-34.

Growth of cable's digital capacity does not solve these problems. Digital projections cited by the NAB and other pro-must carry commenters are overly optimistic, and, in any event, should not be the basis for adopting public policy. Among other changes, digital conversion requires expensive new converters, which will be in less than half of cable homes by 2008. *See* Paul Kagan Assoc., Inc., CABLE PROGRAM INVESTOR (Oct. 14, 1998) at 1 (predicting 49.4 percent of cable subscribers will have digital capacity by 2008). Finally, digital cable services, for the most part, will not be available as basic services.

Conclusion

For the foregoing reasons, AETN respectfully requests that the Commission reject must carry as a policy for the DTV conversion.

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averages, the SPR Analysis chooses to ignore this approach when considering whether an "average" system would be able to carry all -- or any -- of the digital signals in a particular market in light of the clear statutory cap.

Respectfully submitted,

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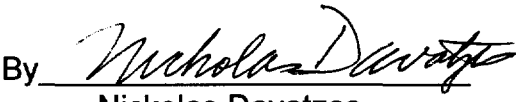
By 
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